

JUDGE JAMES L. ROBART

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,	)	NO. CR 11-228 JLR
	)	
Plaintiff,	)	DEFENDANT ABDUL-LATIF'S
	)	EVIDENTIARY HEARING BRIEF
vs.	)	
	)	
ABU KHALID ABDUL-LATIF,	)	
	)	
Defendant.	)	
	)	
	)	

# **I. Introduction**

An evidentiary hearing is scheduled in this matter for December 7, 2012. At issue are two spoliation motions filed by the defense based upon the willful destruction of evidence by Seattle Police Detective Samuel DeJesus and the Paid Informant.<sup>1</sup> The people who have relevant evidence to present at the evidentiary hearing and are therefore expected to testify are: (1) the Paid Informant; (2) Special Agent Ethan Via; (3) SA Albert Kelly; (4) Supervisor SA Sean Moore; (5) Det. Samuel DeJesus, (6) SPD Sergeant Erik Allen; (7) SPD Detective Greg Tomlinson; (8) Assistant United States Attorney Michael Dion; and (9) Assistant United States Attorney Todd Greenberg.

At the hearing, in keeping with the practice in this district and pursuant to Fed. R. Evid. 615, the defense anticipated moving for an order to exclude witnesses from the courtroom and

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<sup>1</sup> See Defense Motion to Dismiss Indictment Based on Government's Intentional Destruction of Evidence (Dkt. No. 141); Defense Motion to Exclude Evidence and Provide a Jury Instruction For Failure to Preserve Exculpatory Evidence (Dkt. No. 96).

1 to bar witnesses from discussing their testimony. However, these anticipated motions raise a  
2 much more complex and novel issue before the Court because the Assistant United States  
3 Attorney witnesses are both advocates and fact witnesses in these proceedings.

4 Presumably understanding the dilemma raised by AUSAs Dion's and Greenberg's dual  
5 roles as witnesses and advocates, the government proposed to the defense that for the first half  
6 of the hearing, AUSAs Greenberg and Dion would represent the government and present the  
7 testimony of the other lay and law enforcement witnesses, and that thereafter, their supervisor,  
8 AUSA Robert Westinghouse, would present the testimony of AUSA Dion and AUSA  
9 Greenberg. Although the defense certainly appreciates the willingness of the government to  
10 testify, the government's proposal deprives the defense of the benefits (and intent) of Rule  
11 615, and implicates the underlying concern of RPC 3.7, that public confidence in the criminal  
12 justice system not be eroded by even the appearance of impropriety. Accordingly, counsel for  
13 Mr. Abdul-Latif, by this brief and motion, brings the issue before the Court at this time.

14 Additionally, the government informed the defense that if the defense did not agree  
15 with its proposal, the government would take a "hardline position" that AUSAs Dion and  
16 Greenberg should not be compelled to testify because there are alternate means to present  
17 their testimony and that, even if they could be compelled to testify, they should be allowed to  
18 serve as both advocates and witnesses at the hearing as proposed. The defense thus also moves  
19 to compel AUSAs Dion's and Greenberg's testimony, should the government indeed, take that  
20 position in response to the defense motion to exclude witnesses from the courtroom. *See, e.g.,*  
21 *Gajewski v. United States*, 321 F.2d 261, 268-69 (8th Cir. 1963) ("an accused's right to call  
22 relevant witnesses and to present a complete defense may not be abrogated for the sake of trial  
23 convenience or for the purpose of protecting a United States Attorney from possible  
24 embarrassment while testifying, if he possesses information vital to the defense").

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1 **II. Motions in Limine**

2 **A. Motion to Exclude Witnesses from the Courtroom**

3 Mr. Abdul-Latif moves this Court for an order excluding witnesses from the courtroom  
 4 during trial. *See* Fed. R. Evid. 615 (“At the request of a party the court shall order witnesses  
 5 excluded so that they cannot hear the testimony of other witnesses”). It is further requested  
 6 that the Court order that all witnesses be advised not to discuss their testimony or the  
 7 testimony of other witnesses until after the evidentiary hearing is completed. *See Geders v.*  
 8 *United States*, 425 U.S. 80, 87 (1976) (“The judge’s power to control the progress and, within  
 9 the limits of the adversary system, the shape of the [hearing] includes broad power to  
 10 sequester witnesses before, during, and after their testimony.”). Under Rule 615, sequestration  
 11 of witnesses is mandatory if requested. *United States v. Farnham*, 791 F.2d 331, 335 (4th Cir.  
 12 1986).

13 With respect to the anticipated law enforcement witnesses, the defense has no objection  
 14 to the government designating one law enforcement agent to be present during the evidentiary  
 15 hearing to assist the prosecution. Defense counsel requests the same courtesy and asks  
 16 permission to have one defense investigator present in the courtroom during the evidentiary  
 17 hearing.

18 While normally lawyer representatives are not subject to Rule 615 because the Rule  
 19 relates only to “witnesses,” AUSAs Greenberg and Dion will be both percipient witnesses and  
 20 advocates at the hearing. Because the Court is the trier of fact, the defense does not seek their  
 21 recusal under the advocate-witness rule since the concern that “jurors will be unduly  
 22 influenced by the prestige and prominence of the prosecutor’s office and will base their  
 23 credibility determinations on improper factors” will not be at play here. *United States v.*  
 24 *Edwards*, 154 F.3d 915, 921 (9th Cir. 1998); *see* ABA Model Rule of Professional Conduct  
 25 3.7, Comment (2) (“It may not be clear whether a statement by an advocate-witness should be  
 26 taken as proof or as an analysis of the proof.”). But the Court’s decision concerning

sequestration and the proper order of testimony to assure proper conduct and to prevent the appearance of impropriety should nonetheless be informed by the principles underlying the advocate-witness rule. *See* Rule 3.7 of the Washington Rules of Professional Conduct and the ABA Model Rules of Professional Conduct 3.7 (providing that a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless four narrow exceptions apply).<sup>2</sup> *See also United States v. Prantil*, 764 F.2d 548, 522 (9th Cir. 1985) (where defendant had compelling need for prosecutor's testimony, trial court denied defendant rights under confrontation and compulsory process clauses of Sixth Amendment by denying defense motion to recuse prosecutor so he could be called as witness); *cf.*, *Geders*, 425 U.S. at 86 ("The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process. To this end, he may determine generally the order in which parties will adduce proof; his determination will be reviewed only for abuse of discretion.").

## **B. Motion to Compel Testimony**

### **1. Factual background.**

By telephone and a subsequent letter dated August 3, 2012, the government informed the defense that Det. DeJesus intentionally destroyed nearly 400 text messages with the Paid Informant in violation of repeated directives by both AUSA Dion and AUSA Greenberg that

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<sup>2</sup> Rule 3.7 states:

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
  - (1) the testimony relates to an uncontested issue;
  - (2) the testimony relates to the nature and value of legal services rendered in the case;
  - (3) the disqualification of the lawyer would work substantial hardship on the client;
  - or
  - (4) the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate.

Washington Rule of Professional Conduct 3.7; *see also* ABA Model Rules of Professional Conduct 3.7.

1 all text message communications should be preserved.<sup>3</sup> Based upon that information, the  
 2 defense notified the prosecution on September 17, 2012, that it intended to call AUSAs Dion  
 3 and Greenberg to testify at the hearing concerning the willful destruction of evidence by Det.  
 4 DeJesus and by the Paid Informant.

5 Additional grounds arose for AUSAs Dion's and Greenberg's testimony when the  
 6 government argued, in its Opposition to the Motion to Dismiss the Indictment, that Det.  
 7 DeJesus's spoliation of evidence did not violate the Due Process Clause because the federal  
 8 government had no control over Det. DeJesus, since his involvement in the Abdul-Latif  
 9 investigation was "purely voluntary"<sup>4</sup> and that its Paid Informant's destruction of evidence did  
 10 not violate due process because he was not acting as a government agent when he reset his  
 11 cellular telephone, and was attempting to hide his own criminal conduct.<sup>5</sup>

12 Thereafter, the government and the defense met in an effort to explore alternatives to  
 13 AUSAs Greenberg and Dion testifying at the hearing. The government agreed to submit to  
 14 limited questioning by the defense concerning matters related to contacts that AUSAs Dion  
 15 and Greenberg had with Det. DeJesus relating to the issue of preserving his text messages  
 16 with the Paid Informant. The government made clear that AUSAs Dion and Greenberg would  
 17 answer no questions beyond that topic.

18 On October 25, 2012, the defense interviewed AUSAs Dion and Greenberg, who were  
 19 both represented by AUSA Westinghouse. In accordance with the limitations the government  
 20 placed on the interviews, the defense did not question either prosecutor regarding the scope of  
 21 the government's agency relationship with the Paid Informant. Nor did the defense question  
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23 <sup>3</sup> See Letter from Todd Greenberg, dated August 3, 2012 (attached as Ex. R to Motion to Dismiss  
 24 Indictment (Dkt. No. 141) (filed under seal).

25 <sup>4</sup> See, e.g., Govt.'s Opposition to Motion to Dismiss Indictment at 14 (Dkt. No. 152).

26 <sup>5</sup> See, e.g., Govt. Opposition to Motion to Exclude Evidence and Provide Jury Instruction at 5-7  
 (Dkt. No. 155).

1 either witness about the degree of control the federal government had over Det. DeJesus or the  
2 scope of the Paid Informant's agency relationship with federal and state authorities.

3 The interviews confirmed that both witnesses had relevant information to present the  
4 Court concerning instructions each had given Det. DeJesus on separate occasions directing  
5 that he preserve his text messages with the Paid Informant as well as the text messages the  
6 Paid Informant exchanged with the targets of the investigation. The frequency and context of  
7 the instructions both AUSAs gave Det. DeJesus to preserve all text messages raise serious  
8 doubts with respect to Det. DeJesus's anticipated testimony that he does not remember  
9 receiving any instructions and that while he may have received those instructions, he  
10 misunderstood them.<sup>6</sup>

11 Following the interview, the defense informed the government that it needed to call  
12 AUSAs Greenberg and Dion at the evidentiary hearing concerning the instructions they gave  
13 Det. DeJesus, the scope of the agency relationship with the Paid Informant and Det. DeJesus,  
14 as well as other factual matters that may be revealed by the testimony of the other witnesses.  
15 Indeed, the defense has been unable to determine how AUSA Dion's and AUSA Greenberg's  
16 respective recollection of relevant events comports with the memory of the investigative team  
17 members because, to date, none of the other witnesses have agreed to meet with the defense.  
18 Nor are there any reports or notes of the witnesses's anticipated testimony, according to the  
19 government.

20 In response to the notice that the defense intended to call AUSAs Dion and Greenberg,  
21 the government proposed that AUSAs Dion and Greenberg represent the government at the  
22 hearing but that AUSA Westinghouse represent the government and that he conduct the direct  
23 examinations of AUSAs Dion and Greenberg. The government informed the defense that if  
24 the defense did not agree with its proposal, it would take a "hardline position" and that  
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26 <sup>6</sup> See Letter from Todd Greenberg, dated July 25, 2012 (Ex. V to Motion to Dismiss Indictment (Dkt. No. 141)).

1 AUSAs Dion and Greenberg would no longer agree to testify. Instead, the government would  
 2 assert that AUSA Greenberg's and Dion's testimony were not warranted and that even if the  
 3 Court could compel their testimony, they should be permitted to act as both advocates and  
 4 witnesses, as proposed.

5 **2. AUSAs Dion and Greenberg should be compelled to testify**  
 6 **regarding Mr. Abdul-Latif's motions based on the**  
 7 **government's intentional destruction of evidence because**  
 8 **Mr. Abdul-Latif has a right to present all relevant**  
 9 **testimony.**

10 Courts have consistently recognized the paramount importance of a defendant's Sixth  
 11 Amendment right to present his own defense. That right includes the right to offer the  
 12 testimony of witnesses, and to compel their attendance. The Supreme Court has emphasized,

13 [t]he right to offer the testimony of witnesses, and to compel  
 14 their attendance, if necessary, is in plain terms the right to  
 15 present a defense, the right to present the defendant's version  
 16 of the facts as well as the prosecution's to the [factfinder] so it  
 17 may decide where the truth lies. Just as an accused has the  
 18 right to confront the prosecution's witnesses for the purpose of  
 19 challenging their testimony, he has the right to present his own  
 20 witnesses to establish a defense. *This right is a fundamental*  
 21 *element of due process of law.*

22 *Washington v. Texas*, 388 U.S. 14, 19 (1967) (emphasis added).

23 Here, both AUSAs Dion and Greenberg are percipient witnesses to important events  
 24 critical to the resolution of the pending motions. With respect to both motions, the  
 25 government does not dispute that Det. DeJesus or the Paid Informant intentionally destroyed  
 26 nearly 400 text messages, and in Det. DeJesus's case, despite repeated directives to preserve  
 all such communications. *See* Dkt. No. 152 at 1. Instead, the government argues that Mr.  
 Abdul-Latif is not entitled to any redress for Det. DeJesus's misconduct because (1) Det.  
 DeJesus did not act in bad faith when he destroyed the text messages because he did not  
 believe the evidence to have exculpatory value and he could not recall or simply  
 misunderstood the AUSAs's repeated directives to preserve all text communications; (2) Det.



DeJesus's misconduct is not attributable to the federal government since Det. DeJesus was not their agent but, rather, a "volunteer" over whom the government had no control; and (3) there is no prejudice to Mr. Abdul-Latif because the defense can cross-examine the Paid Informant regarding his criminal past, misconduct while on supervision and substantial compensation received from the government. AUSAs Dion and Greenberg have relevant testimony to present concerning some, if not all, of these contested matters.

Specifically, for example, AUSAs Greenberg and Dion have relevant testimony to present concerning facts bearing upon the Court's assessment of bad faith. The issue of bad faith under *Arizona v. Youngblood*, 488 U.S. 51, (1988), is necessarily a mixed question of law and fact in which the quintessential factual question of intent predominates. *United States v. Bohl*, 25 F.3d 904, 909 (10th Cir. 1994). Here, AUSAs Greenberg and Dion can testify to facts which bear on Det. DeJesus's state of mind at the time he destroyed the evidence. *See Richter v. Hickman*, 5231 F.3d 1222 (9th Cir. 2008), *on reh'g en banc rev'd on other grounds*, 578 F.3d 944 (9th Cir. 2009) ("The Supreme Court made clear in *Trombetta* and *Youngblood* that the dispositive issue for due process purposes is the state of mind of police or prosecutors at the time the evidence is lost or destroyed").

In particular, one of the ways to demonstrate that Det. DeJesus acted in bad faith when he destroyed his text message communications with the Paid Informant is to show that he did so in violation of repeated directives from the AUSA. *Compare California v. Trombetta*, 467 U.S. 479, 488 (1984) ("the officers here were acting in good faith and in accord with their normal practice") (internal quotation marks and citation omitted); *Mitchell v. Goldsmith*, 878 F.2d 319, 322 (9th Cir. 1989) (observing, in the course of enumerating reasons for not finding bad faith, that "the police were acting in accord with their "normal practice"). *See also Youngblood*, 488 U.S. at 58 (emphasis added) (Court suggesting that exculpatory value of evidence need not be shown where "the police themselves *by their conduct* indicate that the evidence could form a basis for exonerating the defendant").



1 Based upon the interview of AUSA Greenberg, it is anticipated that the government  
2 will testify that on June 6, 2011, Det. DeJesus was instructed, along with other members of  
3 the investigation team, to save all text messages between the Paid Informant and the targets of  
4 the investigation, as well as the Paid Informant and state or federal law enforcement.

5 AUSA Dion will similarly testify that on or about June 9, 2011, he had a one-on-one  
6 conversation with Det. DeJesus at a team meeting, during which Det. DeJesus acknowledged  
7 that he and the Paid Informant were communicating by text messages and he agreed to  
8 preserve the communications.

9 Also at issue is the government's agency relationship with Det. DeJesus and the Paid  
10 Informant, which the government contests. AUSA Greenberg can testify, for instance,  
11 regarding Det. DeJesus's involvement in the Joint Terrorism Task Force (JTTF)-led  
12 investigation. Specifically, it is anticipated that AUSA Greenberg will testify that at the June  
13 6 meeting, the Federal Bureau of Investigations assumed control of the investigation, but that  
14 Det. DeJesus was to stay involved in the investigation as the Paid Informant's handler. He  
15 will also testify that he believed the FBI was coordinating with the SPD to preserve evidence.  
16 AUSAs Dion and Greenberg may also have additional knowledge concerning either Det.  
17 DeJesus's involvement or his role in the JTTF-led investigation. The defense was prevented  
18 from exploring these facts at the pre-evidentiary hearing interview in any depth because of the  
19 limitations placed on the interview by the government.

20 Similarly, both prosecutors have relevant and important evidence bearing upon the  
21 motion regarding the Paid Informant's deliberate destruction of evidence. It is undisputed that  
22 the Paid Informant intentionally reset his cellular telephone and thereby destroyed evidence  
23 including, among other things, several text messages with Mr. Abdul-Latif and with Det.  
24 DeJesus, and the illegal activity he claims prompted him to reset his telephone. *See* Dkt. No.  
25 155 at 1. But the government argues no consequences should flow from this destruction of  
26

1 evidence because the Paid Informant was not “federal law enforcement.” *Id.* However, as the  
 2 defense noted in its Reply Motion to Exclude Evidence and Provide Jury Instruction for  
 3 Failure to Preserve Exculpatory Evidence (Dkt. No. 166), a private citizen acting as an agent  
 4 of the government is not “to the slightest degree more free from all relevant constitutional  
 5 restrictions than is any other government agent.” *Hoffa v. United States*, 385 U.S. 293, 311  
 6 (1966). The defense anticipates that the evidence will show that part of the Paid Informant’s  
 7 duties in this investigation was to preserve his communications with the targets of the  
 8 investigation. It is anticipated that AUSA Greenberg, for example, will testify that he  
 9 specifically directed that text communications between the Paid Informant and the  
 10 investigation targets be preserved. AUSA Dion will likely testify that he knew the Paid  
 11 Informant was serving as the repository for this information. Their expected testimony will  
 12 accordingly inform the Court’s determination of whether the evidence was deleted in bad  
 13 faith.

14 In sum, the prosecutors have relevant and important information bearing on the issues  
 15 before the Court. Because their testimony is necessary, they should testify as requested by the  
 16 defense.

### 17 **III. Conclusion**

18 In keeping with Fed. R. Evid. 615, the Fifth and Sixth Amendments, as well as the  
 19 need to avoid even the appearance of impropriety, the Court is respectfully requested to enter  
 20 an Order excluding all witnesses, including Assistant United States Attorneys Michael Dion  
 21 and Todd Greenberg from the courtroom during the evidentiary hearing, and directing all  
 22 witnesses and parties to not discuss their testimony or the testimony of other witnesses until  
 23 after the evidentiary hearing is completed.

24 Respectfully submitted this 19th day of November, 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 19, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to Assistant United States Attorneys Michael Dion, Todd Greenberg and Robert Westinghouse.

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